

Decision of the European Ombudsman on complaint 1286/2003/JMA against the European Commission

Decision

Case 1286/2003/JMA - Opened on 29/09/2003 - Decision on 19/10/2004

Strasbourg, 19 October 2004

Dear Mr M.,

On 15 July 2003, you lodged a complaint with the European Ombudsman against the European Commission on behalf of the environmental organisation "Friends of the Earth" (FoE). Your complaint concerns the Commission's decision of 5 May 2003 to refuse your request for public access to a number of documents related to the ongoing negotiations taking place under the auspices of the World Trade Organisation (WTO), under the General Agreement on Trade in Services.

On 29 September 2003, I forwarded the complaint to the President of the Commission. On 18 November 2003, the Commission sent me its opinion, which I forwarded to you with an invitation to submit observations. I received your observations on the Commission's opinion on 18 December 2003.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the length of time it has taken to deal with your case.

THE COMPLAINT

According to the complainant, the facts of the case are, in summary, as follows:

On 21 February 2003, "Friends of the Earth" (FoE), wrote to the Secretariat-General of the Commission, requesting access to a number of documents, on the basis of Art 6 of Regulation 1049/2001 [henceforth, "the Regulation"]. The documents in question were as follows: (i) requests made by the EU to other WTO members in the context of the negotiations on trade in services in accordance with the Doha Development Agenda; (ii) all requests and supplementary requests made by non-EU WTO members to the EU; and (iii) the draft initial offer made by the EU to non-EU WTO members.

In the absence of a response, the complainant notified the Commission on 17 March 2003 of its



intention to make a confirmatory application in accordance with the provisions of Art. 7 (4) of the Regulation. Whereupon, he sent a confirmatory application on 19 March 2003. On 20 March 2003, the Commission's Director General for Trade refused the complainant's request. On 4 April 2003, the complainant made a second confirmatory application which contested the substance of the refusal. On 5 May 2003, the Secretary General of the Commission confirmed the position taken by the responsible services.

In parallel to the above requests, FoE also requested identical information from the UK authorities. These requests were also refused.

The complainant alleged that the Commission misunderstood and acted in breach of its obligations under the Regulation. He put forward the following arguments in support of his allegations:

Failure to demonstrate that the protection of the public interest was impaired

The complainant argued that the Commission was wrong to base its refusal on the exception provided in Art. 4 (1) of the Regulation, concerning the protection of the public interest in international relations. He considered that the Commission's Secretary General erred in his overly broad interpretation of Art. 4 (1) of the Regulation by arguing that the documents related to a traditional method of negotiation and, as a result, all bilateral requests should be kept confidential among negotiators. In the complainant's view, the Commission's argument merely demonstrates that international relations could be affected by the release of the requested documents. He believed, however, that the Commission had not been able to demonstrate that disclosure would undermine the protection of the public interest as regards international relations.

Nature of the method of negotiation within the WTO

The complainant argued that the right of access to information under the Regulation is of particular importance in this type of situation, because of the implications of trade-related agreements negotiated under the WTO. In his view, the fact that a method of negotiation might be traditional or generally agreed upon is not sufficient to justify withholding the requested documents.

Regardless of the Commission's apparent reliance on the notion of sovereignty, the complainant underlined that in its dealings with the British authorities, the institution insisted that the requested documents should be treated confidentially and were not to be released to the general public or for wider circulation, thereby expressly undermining the sovereignty of the UK.

The complainant argued that the Commission's Secretary General provided no information as to why the method of negotiation followed by the parties to the WTO was to be considered traditional. Nor did he explain in what context the method had been generally agreed upon. In his view, all WTO members were free at the outset of the negotiations to establish their own procedures. The Commission had not suggested that it took into account the provisions of the Regulation when it agreed to take part in negotiations with a method which would undermine public access, and therefore the aim of the Regulation. In the complainant's view, the only reason offered by the Commission in support of this particular negotiation method is that disclosure of the requests would impinge on the ability of sovereign states to decide how to take



those requests back to their own stake-holders. Yet, the complainant noted that no explanation had been given on how this would be so. For the complainant, the expectation that the European Commission should negotiate in accordance with a traditional method was not a sufficiently strong basis to give rise to the exemption provided for in Article 4 (1) of the Regulation.

No balancing of the interests at stake

The complainant argued that the Regulation requires a balancing exercise between the public interest, as regards international relations, and the public interest in access to information. According to the complainant, the Commission had not properly weighed up the competing public interests.

Failure to apply the exception in a restrictive manner

The complainant pointed out that the Commission had not applied the exceptions in an appropriately restrictive manner, as required by the Community courts. On the contrary, the relevant exemption had been interpreted in an unnecessarily broad manner so as to prejudice the right of access to information, to which Art. 4 (1) of the Regulation is only an exception. The complainant noted that, as the Community courts have held, the responsible institution has to provide evidence that disclosure is likely to cause actual harm to relations with third countries, and that the risk of the public interest being undermined must therefore be reasonably foreseeable and not purely hypothetical.

In view of the above, the complainant concluded that the Commission had failed to justify its refusal of access to his requests, in breach of its obligations under the Regulation.

In summary, the complainant alleged that the Commission erred in its interpretation of Article 4 (1) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, and claimed that the requested documents be disclosed.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission argued that it had met its legal obligations by demonstrating that disclosure of the requested documents would undermine the public interest as regards international relations. The Commission noted that it had been assigned the task of negotiating international trade agreements in the framework of the WTO, which is negotiated on behalf of the EC and the Member States. The public interest was to be understood in this instance as enabling the Commission to successfully carry out the negotiations. Traditionally, this type of trade negotiation has been carried out through a method based on the request-offer approach. By overturning the traditional manner of trade negotiations, the Commission would have breached the expectations of the negotiating parties whereby they should be in a position to decide themselves on how to take requests back to their own stakeholders for review, and how to develop counter-bids. This would have affected the Commission's relations with its trading partners, and as a result, generated a negative impact on these very sensitive negotiations.

As regards the traditional nature of the negotiations generally agreed upon by all partners, the Commission pointed out that this concept is to be found in paragraph 11 of the WTO's



Guidelines and procedures for the negotiations on trade in services. This method allows WTO members to make clear to their trading partners what their respective interests are and to facilitate the convergence of positions with a view to achieving an overall agreement. As a result of this obligation, the Commission did not consider it appropriate to try to impose a more transparent negotiation method, even if it was not legally prevented from doing so.

The complexity and the sensitivity of the negotiations have to be seen as a whole. The legitimate expectations of the EU's trading partners and the Commission's possibilities to successfully fulfil its negotiation mandate also have to be considered as substantive reasons in support of not breaching the negotiation method. A breach of these expectations would have led to a situation where the trading partners would develop a less open and a more hostile attitude towards the Commission and that this, in turn, would reduce the Commission's possibilities to bring negotiations to a successful close.

With regard to the complainant's position on the balancing of interests, the Commission agreed that there is always a public interest in transparency and thus in disclosure of any document held by a public administration, in accordance with recital 2 of the Regulation. However, the Regulation establishes certain exceptions to this rule. Accordingly, all documents held by the Commission are in principle accessible to the public, unless their disclosure would undermine certain public and private interests listed in Article 4 of the Regulation.

The Commission pointed out that the key element of the treatment of an application for access to documents is to carry out a harm test in order to determine whether disclosure would undermine any of those interests. If no exception applies, access is granted, without any need for a balancing of interests. If an exception applies, access is refused. Nevertheless, as regards the exceptions laid down in Article 4 (2) and 4 (3), there is a possible further exception to these exceptions, namely the existence of an overriding public interest in disclosure. In order to establish whether such interest exists, a balancing of interests must be carried out. The institution noted that the protection of international relations (Article 4.1 a of the Regulation), however, is a mandatory exception, and not subject to any further balancing of interests.

Hereupon, the Commission concluded that some of the arguments raised by the complainant, namely his concerns with regard to whether the process of setting the WTO agreements is sufficiently democratic or the alleged public interest in renegotiating the method of negotiation, were not pertinent.

As regards whether the exception had been interpreted in a restrictive manner, the Commission explained that withholding the documents is justified not because the negotiation method is traditional or generally agreed upon, but because disclosure would undermine the protection of the public interest as regards international relations. The Commission contends that this is a restrictive interpretation of the exception, strictly confined to a concrete context.

The Commission justified its contacts with the UK authorities on the grounds that the consultation system set out in Articles 4 (4) (5) and 5 of the Regulation, requires that consultation of the author take place if it is not clear that the document shall or shall not be



disclosed. The Regulation applies to all documents held by the concerned institutions, including documents originating from third parties. Taking into consideration this premise and the nature of the documents concerned, the Commission dismissed the complainant's argument that the Commission may have undermined the sovereignty of the UK authorities by replying to the consultation made in accordance with Article 5 of the Regulation.

Consequently, for the reasons set out above, the Commission considered that it had adequately handled the complainant's request for access to documents both at the initial and at the confirmatory level. The institution believed that its services did not err in their interpretation of the Regulation, in particular that of Article 4 (1) (a), and that they did not fail to justify the refusal of access to the documents concerned.

The complainant's observations

In reply to the Ombudsman's invitation to submit observations, the complainant indicated that the Commission's opinion did not raise any further issue which would either alter the substance of the complaint or require a further response.

THE DECISION

1 Commission's refusal to grant access to the documents related to the WTO negotiations

1.1 The complainant's application to the Commission for access to a number of documents concerning the ongoing negotiations taking place under the auspices of the World Trade Organisation (WTO) was refused. The complainant alleges that the Commission erred in its interpretation of Article 4 (1) of Regulation 1049/2001. He therefore claims that the requested documents should be disclosed.

In support of his allegation and claim, the complainant argues that the Commission failed to: (i) demonstrate that disclosure would undermine the protection of the public interest; (ii) justify why the confidential method of negotiation followed by the WTO was traditional or generally agreed upon; (iii) balance the interests at stake; and (iv) apply the relevant exception in a restrictive manner.

1.2 The Commission considers that it handled the complainant's request for access to documents properly both at the initial and at the confirmatory level. The institution believes that its services did not err in their interpretation of the Regulation, in particular that of Article 4 (1) (a), and that it adequately justified its refusal.

1.3 At the outset, and before addressing the detailed arguments made by the complainant and the Commission, the Ombudsman considers it useful to recall some of the general principles which inform the scheme for public access to documents enshrined in Regulation (EC) No 1049/2001 (1) [henceforth, the Regulation], which replaced, among others, Council Decision 93/731/EC on public access to Council documents (2) and Commission Decision 94/90/EC on public access to Commission documents (3) .

The Regulation confers on citizens a right of access to documents held by the European



Parliament, the Council and the Commission and their agencies, by laying down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty (4) .

Even though the Regulation is aimed at developing the general principle that citizens are to have access to documents, it contains two categories of exceptions. The first category is worded in mandatory terms and provides that the institutions will refuse access to any document where disclosure could undermine, *inter alia* , the protection of the public interest in cases in which the issues at stake refer to public security, defence and military matters, international relations, financial, monetary or economic policy, privacy and the integrity of the individual (5) . The second category of exceptions concerns the protection of commercial interests, court proceedings and legal advice, documents related to inspections, investigations and audits, documents for internal use in pending matters, which may justify a refusal of access if and only if there is no overriding public interest in disclosure, for which a balancing of interests has to be carried out (6) .

However, as the Community courts have stated in relation to the provisions of the previous legislation, the exceptions to public access to documents have to be interpreted and applied restrictively, so as not to frustrate the application of the general principle of giving the public the widest possible access to documents (7) .

1.4 The Ombudsman notes that, as the Community courts have held in the context of decisions taken by both the Council and the Commission to refuse access on the basis of the exception relating to the protection of the public interest in the field of international relations, the responsible institution exercised in those cases a discretion which is among the political responsibilities conferred on it by provisions of the Treaties. In those circumstances, the scope of review has been limited to verifying whether the procedural rules have been complied with, the decision at issue is properly reasoned and the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (8) .

Taking account of the above case law, the Ombudsman considers that his own review of the substance of the Commission's decision in the present case should focus on whether it is reasonable.

Alleged failure to demonstrate impairment of the protection of the public interest

1.5 The complainant argues that the Commission erred in its overly broad interpretation of Art. 4 (1) of the Regulation, since it has not been able to demonstrate that disclosure would undermine the protection of the public interest as regards international relations. In the complainant's view, the Commission's argument only demonstrates that international relations may be affected by the release of the requested documents.

The Commission takes the view that since it was assigned the task of negotiating international trade agreements in the framework of the WTO on behalf of the EC and the Member States, the public interest should be to enable a successful conclusion of the negotiations. In order to do so, the institution has to abide by the traditional manner of trade negotiations in the context of the WTO, whereby bids and counter bids are confidentially exchanged among the parties.



1.6 The Ombudsman notes that a limitation of public access based on the protection of public interest as regards international relations can only be triggered under limited circumstances. It is apparent from the Community courts' case-law regarding the application of identical provisions in the context of Decisions 93/731/EC and 94/90/EC that the responsible institution is obliged to consider in respect of each requested document or each category of documents (9) whether, in the light of the available information, disclosure is likely to undermine the public interest as regards, among others, international relations (10) . Furthermore, if this exception is to apply, the risk of the public interest being undermined must be reasonably foreseeable and not purely hypothetical (11) .

The Ombudsman is also aware that, as the Community courts have stated, refusal of access to the requested documents must be founded on an analysis of factors specific to either the contents or the context of each document or each category of documents, from which it can be concluded that, because of certain specific circumstances, disclosure of such document or category of documents would pose a danger to a particular public interest (12) .

1.7 In this instance, the Commission came to the conclusion that disclosure of the requested documents would impair the protection of the public interest as regards international relations, taking into consideration the context in which these documents were being produced, namely the international trading negotiation process in which the institution was involved. The Ombudsman notes that the Commission considered that the nature of the negotiations taking place within the WTO framework did not allow public access. It has been explained that by general consensus, trade negotiations within the WTO traditionally involve a confidential exchange of offers and counteroffers, whose disclosure to third parties would disrupt the process and endanger the successful conclusion of the negotiations.

1.8 The Ombudsman finds that, should the context of these international negotiations reflect the Commission's description of the negotiation process, it could not then be concluded that the Commission made an unreasonable assessment in deciding that disclosure of the documents at issue was likely to undermine the public interest in the field of international relations.

It appears necessary, therefore, to corroborate whether this description of the nature of the negotiation method has been accurately stated, or whether, in the light of the evidence, there appears to have been an unreasonable assessment of these facts.

Nature of the method of negotiation in the WTO

1.9. The complainant argues that the Commission provided no information as to why the WTO method of negotiation was to be considered traditional, or in what context the method had been generally agreed upon. In his view, the fact that a method of negotiation might be traditional or generally agreed upon would not be sufficient to justify withholding the requested documents. The Commission notes, however, that the reference to the traditional nature of the negotiations which is generally agreed upon by all partners is to be found in paragraph 11 of the WTO's Guidelines and procedures for the negotiations on trade in services.

1.10 The Ombudsman notes that the WTO's Guidelines and Procedures for the Negotiations on Trade in Services of 29 March 2001, adopted by the Special Session of the Council for Trade in



Services, and therefore applicable to the European Union as a member to the WTO, provides in point 11 that,

"Liberalisation shall be advanced through bilateral, plurilateral or multilateral negotiations. The main method of negotiation shall be the request-offer approach".

Even though the content of the request-offer approach has not been formally spelled out in a legal text, the Ombudsman notes that -as the Commission has explained- the practice has developed through the years through what appears to be a long-standing international custom. On the basis of this long-standing practice, the request-offer approach has traditionally involved a confidential exchange of offers and counteroffers among the parties to the negotiation. In this context, disclosure of these documents to third parties appears to have been excluded since it might disrupt the process and endanger the successful conclusion of the negotiations.

1.11 Having reviewed all available information, the Ombudsman finds that the factual existence of this customary method of negotiations has not been called into question and therefore appears undisputed. Notwithstanding the complainant's suggestion that a different negotiation procedure might have been established, and indeed, that the Commission should have made such proposal at the outset, the Ombudsman notes that neither the customary nature of the request-offer approach in the context of the WTO negotiations nor its very existence, have been questioned.

In light of the foregoing, and taking into account the context in which the trade negotiations in the framework of the WTO took place, the Ombudsman considers that the Commission did not appear to make an unreasonable assessment in deciding that disclosure of the documents at issue was likely to undermine the public interest in the field of international relations.

The Ombudsman has therefore concluded that there appears to be no maladministration as regards this aspect of the case.

1.12 The Ombudsman finds, however, that even if the limitations on public access imposed by the nature of the negotiations within the WTO framework are legally acceptable, regard has to be had to the expectations of many citizens towards greater transparency and openness in this important policy area, as the complaint to the Ombudsman illustrates. Particularly so, in view of the recognition of the importance of transparency in the WTO's Guidelines and Procedures for the Negotiations on Trade in Services which in its point 9 provides that negotiations shall be transparent and open to all Member and acceding State.

In the Ombudsman's view, transparency cannot be attained by entirely excluding public access to information. The Ombudsman believes that it would therefore be advisable for the Commission to consider additional means which may render these negotiations more open and transparent for the citizens, and thus facilitate public access to the exchanges among the parties.

The Ombudsman will address a further remark to the Commission to this effect below.



No balancing of the interests at stake

1.13 The complainant alleges that the Commission had not properly weighed up the competing public interests as required by the Regulation, which demands a balancing exercise between the public interest, as regards international relations, and the public interest in access to information. The Commission argues, on the contrary, that the protection of international relations constitutes a mandatory exception, and is therefore not subject to any further balancing of interests.

1.14 As already stated above in the decision, the Ombudsman notes that, in contrast to the exceptions contained in Articles 4 (2) [protection of commercial interests, court proceedings and legal advice, documents related to inspections, investigations and audits] and 4 (3) [documents for internal use in pending matters] of the Regulation, those contained in Article 4 (1), which includes the protection of the public interest as regards international relations, are not subject to an overriding public interest in disclosure. Accordingly, the institution concerned has an obligation to refuse access if disclosure of a document would undermine the public interest as regards international relations.

The Ombudsman is mindful of the fact that the Community legislator has determined that, in a case where the disclosure of a document would undermine the public interest as regards international relations, the latter interest outweighs any public interest in the disclosure of the document. The Ombudsman does not, therefore, consider that the complainant's argument that the Commission failed to carry out a balancing of the interests at stake is sustainable.

Failure to apply the exception in a restrictive manner

1.15 The complainant argues that Commission's interpretation of the exception based on the protection of the public interest regarding international relations had been interpreted in an unnecessarily broad manner so as to substantially and disproportionately prejudice the right of access to information, to which Art. 4 (1) is only an exception. The Commission considers that its interpretation of the notion of the protection of the public interest as regards international relations was strictly confined to a concrete context, and thus carried out in a restrictive manner.

1.16 Taking into account the mandatory nature of the exception based on the protection of the public interest regarding international relations as explained above in paragraphs 1.3 and 1.14 of the decision, and in view of the conclusions reached above in paragraph 1.11, namely that the Commission did not appear to make an unreasonable assessment in deciding that disclosure of the documents at issue was likely to undermine the public interest in the field of international relations, the Ombudsman finds that the Commission acted in accordance with its legal obligations, and therefore that there appears to be no maladministration as regards this aspect of the case.

2 Disclosure of the requested documents

2.1 The complainant claims that the requested documents be disclosed.

2.2 Taking into consideration the above findings, the Ombudsman does not consider it necessary to deal with the complainant's claim.

3 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no



maladministration by the Commission. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

FURTHER REMARK

The Ombudsman finds that even if the limitations on public access imposed by the nature of the negotiations within the WTO framework are legally acceptable, regard has to be had to the expectations of many citizens towards greater transparency and openness in this important policy area. Particularly so, in view of the recognition of the importance of transparency in the WTO's Guidelines and Procedures for the Negotiations on Trade in Services. Transparency cannot be attained by entirely excluding public access to information. The Ombudsman believes that it would therefore be advisable for the Commission to consider additional means which may render these negotiations more open and transparent for the citizens, and thus facilitate public access to the exchanges among the parties.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.05.2001, p. 43).

(2) OJ L 340, 31.12.1993, p. 43.

(3) OJ L 46, 18.2.1994, p. 58.

(4) Whereas (4), Regulation 1049/2001.

(5) Article 4 (1), Regulation 1049/2001.

(6) Article 4 (2)-(3), Regulation 1049/2001.

(7) Case T-309/97 *Bavarian Lager v Commission* [1999] ECR II-3217 par. 39 (see reference to case law mentioned herein).

(8) Case T-14/98 *Heidi Hautala v Council* [1999] ECR II-02489 par. 72; case T-204/99 *Olli Mattila v Council and Commission* [2001] ECR II-02265 par. 59; case T-211/00 *Aldo Kuijter v Council* [2002] ECR II-0485 par. 53.

(9) Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, par. 64.



(10) Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, par. 112.

(11) *Supra* , case T-211/00 *Aldo Kuijer* , par. 56.

(12) *Supra* , case T-211/00 *Aldo Kuijer* , par. 61.